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No. 01-317

Supreme Court, U.S.
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In The

Supreme Court of the United States

KENNETH WEISS,

Petitioner,

v.

REN LABORATORIES OF FLORIDA, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

In his presentation of the parties to this proceeding, Kenneth Weiss ("Mr. Weiss") lists REN Laboratories of Florida, Inc.'s ("REN") parent corporation and states, "[t]here are no other known parent or subsidiary entities to these parties." (Weiss Pet. at ii). In lieu of this statement, REN directs this Court to the Corporate Disclosure Statement filed by REN in its Petition for Writ of Certiorari, Case No. 01-292, which states, "REN Laboratories of Florida, Inc. is now known as Gambro Healthcare Laboratory Services, Inc. Gambro Healthcare, Inc. f/k/a Gambro Healthcare Patient Services, Inc. f/k/a REN Corporation - USA is the parent corporation. There is no publicly held company that owns 10% or more of the company's stock." (REN Pet. at iii).

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STATEMENT OF THE CASE

Instead of setting out again the material facts to the questions presented by this Petition, REN directs this Court to the undisputed facts cited by both the district court and the Eleventh Circuit in this case. (Weiss Pet. at A5-A8 and C23-25).[1] However, in several significant areas REN supplements the statement of facts set forth by Mr. Weiss in his Petition as follows:

Mr. Weiss stresses in several places the importance of the "investigation" undertaken by Dr. Brian Walters ("Dr. Walters"), REN's Medical Director of Microbiology and Immunology, and his "finding" that there was no substance to the allegations of religious harassment by Mr. Weiss. However, Dr. Walters was not officially charged with investigating the complaint. Once the investigation was conducted by another manager, Dr. Walters was asked to talk to Mr. Weiss about unwanted religious discussions with other REN employees. Moreover, Mr. Weiss specifically admitted that he was orally counseled by Dr. Walters regarding unwelcome religious discussions with coworkers and supervisors in the workplace. Mr. Weiss admitted that Dr. Walters told him that "sex, religion and politics are best kept out of the workplace." (R 9/215/247-248).[2] Accordingly, the important fact regarding Dr. Walters' involvement is that it resulted in a warning to Mr. Weiss about holding unwanted religious conversations in the workplace.

Mr. Weiss also specifically failed to refer to the testimony of Evelyn Roby, a supervisor during Mr. Weiss' employment at REN. She testified that REN allowed consensual religious conversations in the workplace, and that she had had several of these conversations with Mr. Weiss. Ms. Roby also testified that she witnessed Mr. Weiss initiate

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[1]REN reserves the right to submit a more detailed fact section, should this Court grant certiorari on the issues presented by Mr. Weiss.

[2]"R" refers to the record filed with the Eleventh Circuit Court of Appeals.

unwelcomed and harassing religious discussions with two of his subordinates. (Weiss Pet. at C8). These material facts were undisputed by Mr. Weiss.

Additionally, there are several instances where Mr. Weiss makes "inferences" about the facts. However, these inferences go beyond reasonable factual interpretation and cross over into argument. Specifically, Mr. Weiss infers that Javed Quershi was "hyper-sensitive" to the discussion of any religion other than his own. (Weiss Pet. at 11). Yet, Mr. Weiss also states that Mr. Quershi simply rejected Mr. Weiss' offer of a Bible saying, "No thank you." (Weiss Pet. at 11). A "hyper-sensitive" Moslem would have a stronger reaction when offered a Christian Bible. Mr. Weiss' factual "inference" here is misleading. In addition, Mr. Weiss infers, without any support, that Mary Piccola, the member of REN management who made the decision to terminate him, "did not like his religion." (Weiss Pet. at 13).[3] However, this is not a factual statement, rather an argument that REN's reasons for terminating Mr. Weiss were a pretext for discrimination. By placing this inference in his recitation of facts, Mr. Weiss substantially misleads the Court. Moreover, there is no proof of pretext in this case.

Finally, it is important to note that there will always be subtle differences in the parties' versions of events, i.e., the conversation Mr. Weiss had with Claudette Cannatella the day before his termination, and the incident on July 21, 1993 where Mr. Weiss violently struck his hand on Mary Piccola's desk during a meeting. However, the evidence regarding the *effect* of these events on REN (and REN's belief about these events) was never disputed. Specifically, there is no material evidence that REN did not *honestly* believe that Mr. Weiss was a poor performer, had been insubordinate and was religiously harassing its employees. (Weiss Pet. at C25).

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[3]In fact, Mary Piccola herself is a Christian.

REASONS WHY THE WRIT SHOULD BE DENIED

I. CERTIORARI IS NOT WARRANTED BECAUSE THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO REVIEW THE STANDARD FOR TITLE VII RELIGIOUS HARASSMENT.

In his Petition for Writ of Certiorari, Mr. Weiss asks this Court to address whether voluntary prayer and proselytization among co-workers in a private corporation constitutes religious harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). (Weiss Pet. at i). In doing so, Mr. Weiss petitions this Court to clarify the standard for Title VII religious harassment. (Weiss Pet. at 18). However, it is wholly unclear why Mr. Weiss believes that the Title VII religious harassment standard is relevant in this case. Mr. Weiss' only claim at trial was that REN terminated his employment on July 23, 1993 "solely due to his religious beliefs," in violation of Title VII. (Weiss Pet. at C1). Accordingly, this case proceeded as a religious disparate treatment case through discovery and trial. However, it appears at this late juncture, that Mr. Weiss is attempting to interject the issue of Title VII religious harassment into this case, perhaps in an effort to divert the Court's attention from the relevant issues presented by REN in its own Petition for Writ of Certiorari, Case No. 01-292, docketed on August 17, 2001. For the following reasons, Mr. Weiss' arguments that the standard for Title VII religious harassment should be reviewed by this Court are not persuasive.

A. The Standard for Title VII Religious Harassment is Irrelevant.

In his Petition, Mr. Weiss seems to be arguing for the first time that REN was required to show that his actions constituted Title VII religious harassment in order to rise to a legitimate, nondiscriminatory reason for terminating him.

In support, Mr. Weiss states that the Fourth, Seventh and Eleventh Circuit Courts of Appeal are in conflict regarding the standard for Title VII religious harassment, and, thus, this Court should clarify it. Mr. Weiss also seems to be arguing that whatever the standard is, REN clearly did not show that Mr. Weiss' actions at work were Title VII religious harassment. Mr. Weiss' arguments are misplaced.

First, it was never REN's burden to show that Mr. Weiss' actions constituted Title VII religious harassment in order to claim his actions were a legitimate, nondiscriminatory reason for terminating him. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-507 (1993) (under the burden-shifting analysis, the plaintiff must first establish a prima facie case of discrimination, and if he is successful in doing so, then the burden shifts to the employer to produce evidence demonstrating that it had a legitimate nondiscriminatory reason for the adverse employment action). In fact, REN never argued that Mr. Weiss' conduct rose to the level of Title VII religious harassment, because it was not required to do so. Rather, REN argued that it could terminate Mr. Weiss for religiously harassing its employees in violation of its anti-harassment policy. (Weiss Pet. at C17-C19). Neither the district court nor the Eleventh Circuit questioned whether REN could present this defense, and it was never questioned by Mr. Weiss until now. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019-1020 (4th Cir. 1996, cert. denied, 522 U.S. 815 (1997) (upholding termination of Evangelical Christian for sending personal, distressing letters to coworkers' homes, criticizing them for ungodly and shameful conduct).

This case is a disparate treatment case. However, Mr. Weiss' Petition claims for the first time that one of REN's reasons for terminating him (religious harassment of REN employees) is now somehow discrimination against him because the reason is based on his practice of his religion. Mr. Weiss argues that this decision will chill innocuous religious speech and conduct in the workplace, as

employers will perceive themselves to be at risk for allowing employees to discuss religion or offer others religious materials during work time. (Weiss Pet. at 21-22). However, the facts of this case fit into a subset of situations where harassment might not rise to the level of Title VII religious harassment, but may also be a non-discriminatory reason for termination. The courts have developed "basic parameters of conduct and have upheld employers that suppress proselytizing activities that become harassing." See Michael Wolf, Bruce Friedman, and Daniel Sutherland, RELIGION IN THE WORKPLACE, A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 62, American Bar Association, 1998. A careful employer can avoid a charge that it is discriminating against a proselytizing employee "if it has fully investigated the facts surrounding the proselytizing and has a sound factual basis for concluding that the employee has either disrupted work or has harassed coworkers." *Id.* Both the Eleventh Circuit and the district court pointed out that it was the continuous nature and frequency of Mr. Weiss' unwanted religious actions, in the face of warnings from his supervisors, along with the fact that Mr. Weiss was a supervisor, that made his conduct unacceptable, against REN policy and a legitimate reason for termination. (Weiss Pet. at A5-A8).

Second, even if the standard for Title VII religious harassment is relevant to this case, there is no conflict in the standard presented by the cases cited by Mr. Weiss in his Petition. See *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 48 (1st Cir. 1998) (jury instruction applied sexual harassment principles to religious harassment claim); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996) (plaintiff's claim based on religious accommodation, not religious harassment, so no definition of religious harassment given); *Venters v. City of Delphi*, 123 F.3d 956, 975 (7th Cir. 1997) (applies sexual harassment principles to Title VII religious harassment claim); *Beasley v. Health Care Service Corp.*, 940 F.2d 1085, 1089 (7th Cir. 1991) (court did not

need to address religious harassment claim because of finding that discharge was for good cause); David J. Stephenson, Jr., Annotation, *What Constitutes Religious Harassment in Employment in Violation of Title VII of Civil Rights Act of 1964*, 149 A.L.R. Fed. 405 (1998) (does not address a conflict in the circuit courts).[4] In fact, federal cases that discuss religious harassment consistently view religious harassment the same as race or gender harassment. See *Venters v. City of Delphi*, 123 F.3d 956, 975 (7th Cir. 1997) (the federal courts have been applying the same hostile environment principles to harassment based on race, religion, national origin and sex since 1971).

B. The Issue of Religious Accommodation is Not Presented By this Case.

In addition, to the extent Mr. Weiss is also arguing that REN is at fault for not accommodating Mr. Weiss' religious practices, this argument must fail, because the issue is not adequately presented by this case. (Weiss Pet. at 20-21). First, Mr. Weiss specifically did not properly preserve the religious accommodation issue for appeal. Mr. Weiss did not plead failure to accommodate in his initial Complaint, and the parties conducted no discovery on this issue. In addition, REN, believing that Mr. Weiss might attempt to insert this issue in this case at a later date, specifically addressed this issue in its Motion for Summary Judgment and Motion in Limine before trial. Because of this, the trial court specifically addressed this issue with Mr. Weiss' counsel during the trial. Mr. Weiss' trial counsel

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[4]In Footnote 3, Mr. Weiss states that most of the circuit court cases cited in his Petition present the religious harassment issue in the same regard as the instant case, i.e., "where an employer contends that it took action against the plaintiff religious employee for religious speech or conduct it considered harassing." (Weiss Pet. at 20, fn. 3). However, only one of the cited cases – *Chalmers v. Tulon Co. of Richmond* – deals with a situation where an employer uses the plaintiff's harassing conduct as a legitimate non-discriminatory reason for terminating the plaintiff.

never stated that this was a religious accommodation case, even when directly asked by the trial judge, and instead focused on the disparate treatment aspects of the case. (R 9/215/301). Moreover, at the jury charge conference, Mr. Weiss' counsel never requested a religious accommodation instruction. In addition, the issue of whether or not REN accommodated Mr. Weiss' religious practices was not posed to the Eleventh Circuit on appeal. Accordingly, because the religious accommodation issue was not addressed by Mr. Weiss at trial or on appeal, he did not properly preserve it for appeal to this Court, and this Court has no jurisdiction to review the issue. See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (it is the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987), *reh'g denied*, 481 U.S. 1033 (1987) (ordinarily the Supreme Court will not decide questions not raised or litigated in the lower courts).

Second, assuming arguendo, that this Court can consider this case in the religious accommodation framework, the evidence weighs in favor of REN. Mr. Weiss admitted at trial that he was aware of REN's anti-harassment policy and that as a supervisor he was responsible for assuring compliance with the policy. (Weiss Pet. at C6-C7). Mr. Weiss also admitted at trial that he never complained to REN that its policies and procedures conflicted with his religious beliefs. (Weiss Pet. at C6). Accordingly, Mr. Weiss gave no notice of his alleged need to be accommodated. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) (in order to establish a prima facie religious accommodation claim, a plaintiff must establish that he or she informed his employer that his bona fide religious belief conflicts with an employment requirement). In addition, Mr. Weiss admitted that REN management told him that he could have consensual, non-threatening religious discussions with co-workers and subordinates. (R 9/215/265-266). Finally, the undisputed

evidence of Mr. Weiss' harassing behavior shows that allowing Mr. Weiss' behavior to continue would present an undue hardship to REN. (Weiss Pet. at A5-A8). Specifically, several employees testified at trial that they would have quit or taken action against REN if the company had not attempted to stop Mr. Weiss' religious harassment. (Weiss Pet. at C9-C10).

Accordingly, even if the religious accommodation issue was properly preserved for appeal, Mr. Weiss' claim should fail. Mr. Weiss failed to present a prima facie claim of religious accommodation because he did not notify REN of any alleged conflict between his beliefs and company policy. Alternatively, even if Mr. Weiss did present a prima facie case, REN adequately accommodated him by allowing him to have consensual religious discussions with co-workers. Finally, Mr. Weiss' unwelcome religious discussions presented an undue hardship on the conduct of REN's business by putting REN in an impossible situation vis `a vis its employees. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) (if Tulon had authorized Ms. Chalmers to write the letters to her co-workers, the company would subject itself to possible suits from the co-workers claiming that Ms. Chalmers violated their religious freedoms, and the company was not required to accommodate that conduct); EEOC Dec. No. 72-1114, 4 F.E.P. 842 (1972) (EEOC ruled that an employer failed to maintain a work environment free of religious harassment triggering a Title VII violation when one of its supervisors preached about religion at work over the objection of employees).[5]

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[5]Throughout this section of his Petition, Mr. Weiss also refers to the First Amendment's protection of religious exercise as well as religious belief. However, the First Amendment is not at issue in this case, because there is no First Amendment right to religious speech in the *private* workplace. Thus, Mr. Weiss' references to the *Tucker* and *Brown* cases in Footnote 4 are irrelevant.

C. Mr. Weiss' Petition Ignores the Alternate Legitimate, Non-Discriminatory Reasons REN had for Terminating His Employment.

Finally, even if this Court believes that the Title VII religious harassment and/or accommodation standards are relevant to this case, certiorari is not warranted because review of those issues will not alter the effect of the Eleventh Circuit's decision. Mr. Weiss' Petition only focuses on one of REN's legitimate, non-discriminatory reasons for terminating him, i.e., his religious harassment of co-workers, subordinates and supervisors. However, at trial and on appeal to the Eleventh Circuit, REN argued two other legitimate, non-discriminatory reasons for terminating Mr. Weiss, i.e. poor performance and insubordination. Specifically, the district court found that the greater weight of the evidence supported REN's assertion that it terminated Mr. Weiss because of religious harassment and *insubordination*. (Weiss Pet. at C25). In addition, the Eleventh Circuit found that the weight of the evidence supported REN's argument that religious harassment, *poor performance* and *insubordination* led to Mr. Weiss' termination. (Weiss Pet. at A5-A8).[6]

Mr. Weiss was required to put forth sufficient evidence to challenge the truth of each of REN's reasons for its employment action. See *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997), *cert. denied*, --- U.S. ---, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998) (defendant granted

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[6]Mr. Weiss notes in his Petition that the Eleventh Circuit erred in basing its decision, in part, on poor performance, because the district court did not find a legitimate nondiscriminatory reason based on poor performance. However, this is a distinction without a difference. Mr. Weiss' poor performance was addressed at every juncture of this case, and it was presented in REN's brief to the Eleventh Circuit as a legitimate non-discriminatory reason. In addition, the district court did not address Mr. Weiss' poor performance only because it stated it did not have to, as Mr. Weiss failed to undermine the veracity of REN's other stated reasons for his termination. (Weiss Pet. at C17-C18, fn. 2).

judgment as a matter of law because plaintiff failed to produce sufficient evidence to permit reasonable juror to reject each one of defendant's legitimate, nondiscriminatory reasons). Because Mr. Weiss does not challenge the Eleventh Circuit's decision that the evidence regarding Mr. Weiss' poor performance and insubordination weighs in favor of REN, his arguments regarding the standard for Title VII religious harassment, even if decided in his favor, would not affect the outcome of this case. REN would still be entitled to a new trial based on the Eleventh Circuit's unchallenged decision that the great weight of the evidence supports the fact that Mr. Weiss was terminated for poor performance and insubordination.

Accordingly, the issues of religious harassment and/or religious accommodation are not relevant to this case, and were not properly brought before this Court. In addition, the cases cited by Mr. Weiss in his Petition do not present a conflict regarding the standard for Title VII religious harassment. Finally, the fact that REN presented two other legitimate, nondiscriminatory reasons for terminating Mr. Weiss, assures that the outcome of this Petition would not affect REN's right to a new trial. Accordingly, certiorari is not warranted.

II. CERTIORARI IS NOT WARRANTED BECAUSE THE STANDARD FOR GRANTING A NEW TRIAL IS CLEAR AND WAS PROPERLY RELIED ON BY THE DISTRICT COURT AND THE ELEVENTH CIRCUIT.

Mr. Weiss' claim that this Court should grant certiorari to "bring clarity to the notoriously unsettled standard for granting a new trial" is unfounded. (Weiss Pet. at 23-24). The District Court applied the correct standard when it conditionally granted REN's Motion for New Trial. Moreover, the Eleventh Circuit Court of Appeals applied the proper standard in affirming the District Court's conditional order granting a new trial. The opinions of both

the District Court and the Eleventh Circuit more than adequately set forth the appropriate standard for granting a new trial. REN will not squander this Court's time with a full recitation of all of the relevant cases from the two opinions. However, there are several flaws in Mr. Weiss' argument that merit some discussion.

A. There is Not a Conflict Over the New Trial Standard in the Eleventh Circuit or Any Other Circuit in the United States.

This Court has ruled that the determination of a motion for new trial rests in the discretion of the trial judge. *See e.g., Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574 (1948), *reh'g denied*, 333 U.S. 830 (1948)("Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) (the district court has the discretion to weigh the evidence when considering a motion for new trial); *Allied Chemical Corp., v. Daiflon, Inc.*, 449 U.S. 33, 36-37 (1980) ("The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court.").

Although Mr. Weiss tries to claim there is a conflict in the Eleventh Circuit Court of Appeals and other Circuits, the case law does not support the argument. The Eleventh Circuit has clearly made the distinction between the standard for granting judgment as a matter of law and a motion for new trial. *See National Car Rental System, Inc. v. Better Monkey Grip Co.*, 511 F.2d 724, 730-731 (5th Cir. 1975)[7],

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[7]All decisions from the Fifth Circuit handed down prior to September 30, 1981 were adopted as binding precedent by the Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

cert. denied, 423 U.S. 894 (1975) (when a district court is considering a motion for directed verdict, it decides a pure question of law without exercising discretion; however, when the trial court determines the propriety of a motion for new trial, the court "may and should exercise a sound discretion, and its ruling thereon will not be reviewed in an appellate court in the absence of a clear abuse of discretion."); *U.S. for the Use and Benefit of Weyerhaeuser Company v. Bucon Construction Company, Inc.*, 430 F.2d 420, 423-424 (5th Cir. 1970) (same); *Ard v. Southwest Forest Indus.*, 849 F.2d 517, 521 (11th Cir. 1988) (a district court may weigh the evidence to determine if the verdict is against the great weight of evidence; a new trial may be appropriate even if there is some evidence that supports the jury verdict).

Other circuits that have addressed the standard for granting a new trial have employed the same analysis as the Eleventh Circuit. *See e.g. Kearns v. Keystone Shipping Company*, 863 F.2d 177, 181 (1st Cir. 1988) (the district court has the discretion to order a new trial when it determines that the verdict is against the great weight of evidence; "[o]nly with appropriate caution and to prevent a miscarriage of justice should a trial court set aside a jury verdict, and only on a finding of an abuse of discretion should a reviewing court set aside the trial court's determination."); *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 365-366 (3rd Cir. 1999) (same); *Turner v. United States*, 229 F.2d 944, 945 (6th Cir. 1956), *cert. denied*, 351 U.S. 970 (1956) (same); *Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 673-674 (8th Cir. 1985) *citing Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir.1984)(In determining if a verdict is against the weight of the evidence, the trial court may conduct its own evaluation of the evidence. It may "weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict."); and *Harris v. Quinones*, 507 F.2d 533, 535 (10th Cir. 1974) (same).

B. The Jury Verdict Was Against the Great Weight of Evidence, Making a New Trial Necessary.

In the case at bar, both the district court and the Eleventh Circuit reviewed the various facts and determined that the jury's verdict that religion made a difference in Mr. Weiss' termination was against the great weight of evidence. The district court noted that the dispositive issue (religious discrimination) "was neither simple nor the subject of highly disputed testimony. The dispositive issue was the complex one of Defendant's intent-whether Defendant terminated Plaintiff because it intended to discriminate against him on the basis of his religion or because it honestly believed he had been insubordinate and religiously harassing employees." (Weiss Pet. at C25). Moreover, both the district court and the Eleventh Circuit relied upon undisputed facts from the trial to support the decision that the jury verdict was against the great weight of evidence. The undisputed facts that support the district court and Eleventh Circuit's opinions will not be repeated here. It was clear to the trial judge that the jury verdict was against the great weight of evidence, making a new trial necessary to avoid a miscarriage of justice.

Mr. Weiss' primary area of attack on the district court and the Eleventh Circuit's opinions regarding a new trial is to claim that the undisputed facts are somehow now in dispute. This is the first time that Mr. Weiss has raised this issue and it is not persuasive. Throughout the trial, the post-trial motions and briefs and the briefs to the Eleventh Circuit, Mr. Weiss has not refuted the undisputed facts. Mr. Weiss admitted at trial that he was insubordinate to his

supervisor, he had performance problems[8], and he was warned several times to stop harassing employees with his religious beliefs. (Weiss Pet. at C6-C8, C19-C24 and A5-A8).

Mr. Weiss was a poor performing supervisor who used his position to harass subordinates, co-workers and supervisors with his religious beliefs. There was no proof that a reasonable jury could possibly rely upon to find that Mr. Weiss was the victim of unlawful religious discrimination. Therefore, a new trial is necessary in this case.

CONCLUSION

The standard for Title VII religious harassment is irrelevant to this case. Mr. Weiss' religious harassment of co-workers, supervisors and subordinates was in violation of REN policy, and, thus, was a legitimate, non-discriminatory reason for REN's decision to terminate Mr. Weiss. In addition, the Eleventh Circuit and the district court both determined that the great weight of the evidence in this case lays in favor of REN, and, based on that evidence, both courts granted a new trial. Specifically, the Eleventh Circuit concluded that the jury's verdict that religion made a difference in Mr. Weiss' termination is contrary to the great weight of the evidence, which "strongly suggests [Mr. Weiss] was terminated for poor job performance, insubordination, and religious harassment of

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[8]Mr. Weiss tried to claim that it was improper for the Eleventh Circuit to consider his performance problems as a basis for a new trial because the district court did not consider it below. This assertion is misleading. The district court did not have to reach this issue when ruling on the Motion for Judgment as a Matter of Law because Mr. Weiss could not discredit the legitimate, nondiscriminatory reasons of religious harassment and insubordination. However, in reviewing whether a new trial was warranted, the district court did list Mr. Weiss' performance problems as evidence of his workplace behavior. Therefore, it was proper for the Eleventh Circuit to consider Mr. Weiss' work performance problems in its analysis of a new trial. (Weiss Pet. at C17-C18, fn. 2; C23-C24; A5-A6).

co-workers, as alleged by [REN]." (REN Pet. at App. 7). For the reasons stated herein, this case presents no fundamental questions of law or any conflict among the United States federal courts of appeals. Accordingly, Mr. Weiss' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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